IN THE

Supreme Court of the United States

No.

ELMER JOSEPH CRACHY

THE STATE OF MICHIGAN

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF MICHIGAN

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1960

No.

ELMER JOSEPH CRACHY,

Petitioner,

vs.

THE STATE OF MICHIGAN,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF MICHIGAN

To the Honorable, the Chief Justice and the Associate Justices of the Supreme Court of the United States:

Petitioner, Elmer Joseph Crachy, respectfully prays that a Writ of Certiorari be issued to the Supreme Court of the State of Michigan to review its order denying the Petitioner leave to appeal from a judgment of conviction in the Circuit Court of Van Buren County, Michigan, adjudging Petitioner guilty of breaking and entering a store in the night-time, and sentencing him to 12 to 15 years imprisonment.

OPINIONS BELOW

The trial court delivered its written Memorandum denying the Petitioner's motion to suppress the evidence. Such Memorandum is not reported, but is set out in full in the Appendix hereto, pages 6 to 13, and appears in the original certified Record filed with this Court at pages 12 to 18.

The court below rendered no opinion, but denied the Petitioner leave to appeal from the holding of the trial court (R. 21; A. 13). The court below also denied the Petitioner's petition for a rehearing of the denial of his motion for leave to appeal (R. 24; A. 13).

GROUNDS ON WHICH THE JURISDICTION OF THIS COURT IS INVOKED

1. The date of the judgment sought to be reviewed was entered January 10, 1961 (R. 24; A. 13). This Petition for Certiorari is filed within ninety days of the denial of the Petition for Rehearing.

2. This Court's jurisdiction is invoked under Title 28, U. S. Code, Sec. 1257(3) and Rule 22(1) of the Rules of this Court.

QUESTIONS PRESENTED FOR REVIEW

1. Where a State, by legal decision, follows the federal "exclusionary rule" as to the admissibility of illegally obtained evidence, do the decisions of this Court as to whether evidence obtained in violation of the Fourth Amendment control on the question of whether the evidence is illegally obtained, or may a State, consistent with the right of privacy guarantee of the due process clause of the Fourteenth Amendment, hold to be not violative of the United States Constitution police conduct which this Court has said to be violative thereof?

2. Does a conviction by a State Court for a State offense deny the "due process of law" required by the Fourteenth Amendment, solely because evidence that was admitted at the trial was obtained under circumstances which would have rendered it inadmissible at a prosecution for violation for federal laws in the courts of the United States because there deemed to be an infraction of the Fourth Amendment, as applied in *Weeks* v. *United States*, 232 U.S. 383?

3. Does the stopping by police officers of an automobile travelling a few miles over the speed limit warrant the search of the car and the seizure of personal property, later discovered to be the fruits of a breaking and entering of a store, where there was absent probable cause to believe a felony was being committed at the time of the stopping for a traffic violation?

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

The constitutional provisions and the statutes involved are as follows:

1. The Fourth Amendment to the United States Constitution.
2. The Fourteenth Amendment to the United States Constitution.
3. Article 2, Section 10 of the Constitution of the State of Michigan.
4. Section 28.874 of the Michigan Statutes Annotated.

The pertinent provisions are set out in full in the Appendix hereto.

CONCISE STATEMENT OF THE CASE

How the Federal Question Was Raised.

A. In the Trial Court.

Prior to trial, at the preliminary hearing held before an examining magistrate, the defendant filed his Motion to Suppress the Evidence (A. 3; R. 7). The facts developed at that hearing surrounding the circumstances of the arrest of the defendant and the subsequent search of his automobile and the seizure of items of personal property, made the subject of the Motion to Suppress, were the basis for the transcript of evidence filed with the Circuit Court of Van Buren County, upon which evidence the Circuit judge made his ruling denying the defendant's motion (A. 7-8; R. 13-14). In the trial court's Memorandum, the court cited federal cases (A. 12-13; R. 17-18).

Michigan, by legal pronouncement, has adopted the "federal exclusionary rule", *People* v. *Marxhausen*, 204 Mich. 559, 3 ALR 1505. The rule in *Marxhausen* is identical with that in *Weeks* v. *United States*, 332 U.S. 383.

B. In the Court Below.

The defendant presented his Petition for Leave to Appeal from the adverse ruling of the trial court to the Supreme Court of Michigan (A. 1-2; R. 3-4). The application stated, amongst others, that *Henry* v. *United States*, 361 U.S. 98 was controlling and dispositive of the issues in the instant case.

The Court below rendered no opinion, but simply denied the Petition for Leave to Appeal. (A. 13; R. 21). It further denied the Petition for Rehearing of defendant's Petition for Leave to Appeal (A. 13; R. 24).

FACTS

(All of the facts pertinent to the issue here are taken from the trial court's Memorandum. A. 7-8; R. 13-14).

"Sometime about 2:30 A.M. on May 19th two Michigan State Police Officers were patrolling on U. S. 12 in Chikaming Township, Berrien County, Michigan, and at that time they observed a Chevrolet panel truck on U. S. 12, and they clocked the speed of the truck at sixty miles per hour. The driver of the truck got out, produced the driver's license in the name of Elmer Crathy, a license issued from the State of Illinois. The officer told him that he had stopped him for speeding—that the posted speed limit was fifty miles per hour on the highway—and that he was going to issue him a summons for speeding, to which Crachy replied that he thought he was going 55, but did not think he was going 60. The officer said that prior to this he had looked in the truck, and on the passengers side was a box containing cartons of cigarettes. Then in back of the panel truck it was covered with blankets, but he could look back there, and there were more boxes—cardboard boxes—and inside these boxes were cartons of cigarettes.

The officer said that he held a conversation with defendant Crachy and asked him where he got all the cigarettes, and he said "Well, we bought them in Benton Harbor from a Flack's Supply Company, or something." He asked defendant Allen where the cigarettes came from, and he said he bought them from Flack's Wholesale Company, and he gave 201 E. Lincolnway as the address.

At one place in the testimony the officer, after telling Crachy that he was going to give him a summons for speeding because he was exceeding the 50 mile limit—the officer said "prior to this I had looked into the car and on the passengers side was a box containing cartons of cigarettes, etc., but later on the officer said that he looked into the car after he told him (Crachy) that he was arrested for speeding.'

There were fourteen cartons of cigarettes offered in evidence. The officer identified them because he had placed his initials, R. P. S., on the end of each carton."

REASONS FOR ALLOWANCE OF THE WRIT

Preliminary Statement

From the facts of this case, it appears clear that the protection a citizen is entitled to under the right to privacy and the freedom against unreasonable searches and seizures was denied Petitioner. The fact that the suspect was in an automobile did not dispense with the need of the officers to have probable cause to make a search. *Henry* v. *United States*, 361 U.S. 98, 104. Although *Carroll* v. *United States*, 267 U.S. 155, relaxed the rule covering searches when a moving vehicle is involved, it did not vitiate in entirety the command of the Fourth Amendment.

I.

HEARING SHOULD BE GRANTED TO DETERMINE WHETHER THE DOCTRINE OF WOLF vs. COLORADO, 338 U.S. 25 APPLIES TO A STATE WHICH HAS ADOPTED THE FEDERAL EXCLUSIONARY RULE RENDERING INADMISSIBLE EVIDENCE OBTAINED IN VIOLATION OF THE FEDERAL CONSTITUTION.

This question has never been squarely determined by the Court. It has been alluded to in a series of recent cases. *Frank* v. *Maryland*, 359 U.S. 360; *Ohio* v. *Price*, 364 U.S. 263.

Review is appropriate here because squarely presented is the federal question as to whether the United States Constitution was violated. This Court, and the justices thereof who have passed upon the question, whether with the majority or with the dissent, has made clear the fact that the guarantee against unreasonable searches and seizures, embodied in the Fourth Amendment, is a part of the Due Process Clause of the Fourteenth Amendment,

whether stated in terms of being "implicit in 'the concept of ordered liberty' " (*Wolf* v. *Colorado*, 338 U.S. 25, 27; *Stefanelli* v. *Minard*, 342 U.S. 117, 119; *Irvine* v. *California*, 347 U.S. 128, 132), or in terms of " '(t)he security of one's privacy against arbitrary intrusion by the police' (being) fundamental to a free society and as such protected by the Fourteenth Amendment" (*Frank* v. *Maryland*, 359 U.S. 360), or in terms of the Fourth Amendment being applicable to the states (dissenting opinions in *Wolf* v. *Colorado*, 338 U.S. 25, 40, 41, 47; dissenting opinion in *Stefanelli* v. *Minard*, 342 U.S. 117, 125; concurring and dissenting opinions in *Irvine* v. *California*, 347 U.S. 128, 138, 151, 152):

Frank v. *Maryland* case, *supra*, rather than suggesting that unreasonable searches and seizure questions in State cases (aside from "shocking conscience" cases like *Rochin* v. *California*, 342 U.S. 165) are foreclosed from consideration by this Court, demonstrates that this Court will be ever alert to examine the questions when presented in an appropriate case. For, as the Court said in *Wolf* v. *Colorado*, 338 U.S. at 27:

> " . . . It is of the very nature of a free society to advance in its standards of what is deemed reasonable and right. Representing as it does a living principle, due process is not confined within a permanent catalogue of what may at a given time be deemed the limits or the essentials of fundamental rights."

In *Frank* v. *Maryland*, the Court paid great deference to a long standing practice. But it did so because of "the carefully circumscribed demand" (359 U.S. at 373) the State made upon the citizen's privacy. No such careful circumscription is present here. For here, indeed, petitioner's liberty was at "the hands of (the) petty officer." (From the quote of James Otis' speech in *Frank* v. *Mary-*

land, p. 364). Where a procedure is a "mask," this Court will move to protect a petitioner's constitutional rights (*Moore* v. *Dempsey*, 261 U.S. 86, 91).

Moreover, we believe the distinction made in *Frank* v. *Maryland*, between a search for health and a search for evidence of criminal action, calls for a hearing here, for it is the latter that is present in the case at bar, not the former.

In *Wolf and Irvine*, the majority of this Court refused to upset, as violative of the Due Process Clause of the Fourteenth Amendment, convictions in which illegally obtained evidence had been admitted. The rationale of these decisions was that the exclusionary rule is not a constitutional command, but is a rule of evidence and that so long as the state provided (by criminal proceedings or suits in trespass for damages) methods of vindication of the right against arbitrary police intrusion of privacy, state convictions so obtained would not be set aside under the Fourteenth Amendment.

However, in the *Wolf* case, this Court said (338 U.S. 25, 28):

> "... (W)ere a State affirmatively to sanction such police incursion into privacy it would run counter to the guaranty of the Fourteenth Amendment."

In *Stefanelli*, this doctrine was adhered to (342 U.S. 117, 119).

The case at bar comes to this Court within this rationale of the *Wolf* case. For, by its adoption of the exclusionary rule, but nevertheless holding the admitted evidence not to have been obtained in violation of the constitutional right against illegal searches and seizures, Michigan has affirmatively sanctioned a violation of the Fourteenth Amendment.

In *Irvine* this Court said (347 U.S. 128, 134) that with the *Wolf* doctrine being known, the "state courts may wish further to reconsider their evidentiary rules. But to upset state convictions before the states have had adequate opportunity to adopt or reject the rule would be an unwarranted use of federal power." As seen, Michigan does have the exclusionary rule (*People* v. *Marxhausen*, 204 Mich. 559).

Accordingly, the case comes to this Court ripe for consideration as to whether there has been an unconstitutional application of the search and seizure guarantee in the same manner as if any other constitutional guarantee were involved.[1]

As we read the last quoted statement from the *Irvine* case, we believe this Court was saying that if, after *Wolf*, a case came to this Court from a state which did have the exclusionary rule, the question as to whether the Fourteenth Amendment protected a defendant convicted by evidence illegally obtained would be reviewed by the Court. Even prior to that, in *Schwartz* v. *Texas*, 344 U.S. 199, the Court granted review but found that the exclusionary rule did not apply. This is such a case, however. The proposition involved is an important one and has not been considered by the Court.

We submit that the recently announced holdings of this Court in *Elkins* v. *United States*, 364 U.S. 206 and *Rios* v. *United States*, 364 U.S. 253 (both decided June 27, 1960) in which the so-called "Silver Platter" doctrine was reversed, are indicative of an awareness that a citizen's con-

[1] *E.g., freedom of press* (*Near* v. *Minnesota*, 283 U.S. 697); right to counsel in criminal cases (*Powell* v. *Alabama*, 287 U.S. 45); freedom of speech (*DeJonge* v. *Oregon*, 299 U.S. 353); freedom of religion (*West Virginia Board of Education* v. *Barnette*, 319 U.S. 624); coerced confessions (*Brown* v. *Mississippi*, 297 U.S. 278).

stitutional rights may be as effectively violated by state officers as by federal officers. The "Silver Platter" cases reversed a long standing policy of permitting federal prosecutions to use state evidence illegally obtained. *Elkins* announced (P. 223):

> "... we hold that evidence obtained by state officers during a search which, if conducted by federal officers would have violated the defendant's immunity from unreasonable searches and seizures under the Fourth Amendment, is inadmissible over the defendant's timely objection in a federal criminal trial."

We submit that review should be granted; and that this is an appropriate case in which the Court should overrule the holding in *Wolf* v. *Colorado*, 338 U.S. 25.

II.

THE EVIDENCE WAS ILLEGALLY OBTAINED BECAUSE THE SEARCH WAS MADE BY STATE TROOPERS WITHOUT PROBABLE CAUSE.

The undisputed facts are set out heretofore from the trial court's Memorandum. The holding of the trial court runs directly counter to this Court's decision in *Henry* v. *United States*, 361 U.S. 98. In *Henry*, there was similarly a moving vehicle. Federal agents observed the defendant riding in a car, stopping in an alley, picking up packages, etc. Prior to the observation by the agents, the officers had suspected the defendant of an involvement in the theft of merchandise from interstate shipments. This Court stated (p. 104):

> "To repeat, an arrest is not justified by what the subsequent search discloses. Under our system suspicion is not enough for an officer to lay hands on a citizen. It is better, so the Fourth Amendment teaches, that the guilty sometimes go free than that citizens be subject to easy arrest."

All that the arresting officers in the instant case had upon which to predicate the search of the automobile was a suspicion about cartons of cigarettes which were in boxes in the back of the car (A. 7; R. 13). It developed six or eight hours later that the cigarettes were the fruits of a breaking and entering. But at the time of arrest the officers had no knowledge that a felony had in fact been committed or that the defendant had committed it. This Court stated in *Nathanson* v. *United States*, 290 U.S. 41 at 47 that, "Mere affirmance of belief or suspicion is not enough".

Accordingly, the illegality of the search cannot be gainsaid.

The important question is whether this Court will review a case where the state court sanctions the illegality in the face of its own exclusionary rule.

CONCLUSION.

For the foregoing reasons, we respectfully urge that this Petition for Certiorari should be granted.

Respectfully submitted,

JULIUS LUCIUS ECHELES AND
SHELDON RUPERT,
Attorneys for Petitioner

CERTIFICATE OF SERVICE

I hereby certify that I have caused to be served, the foregoing Petition for Certiorari by mailing three copies thereof to the Attorney General of the State of Michigan, Lansing, Michigan, and three copies thereof to the State's Attorney of Van Buren County, Paw Paw, Michigan.

JULIUS LUCIUS ECHELES

APPENDIX A

RECORD OF THE STATE PROCEEDINGS

THE PEOPLE OF THE STATE OF MICHIGAN,
Respondent-Plaintiff,
vs.
ELMER JOSEPH CRACHY,
Petitioner-Defendant.
No. 48789½

PETITION FOR LEAVE TO APPEAL FROM THE CIRCUIT COURT OF VAN BUREN COUNTY

Page of Original Record

1 Notice of hearing on Application for Leave to Appeal.

2 Circuit Judge's Certification that Application fairly presents the question for review.

3-4 Application of defendant to Supreme Court of Michigan for Leave to Appeal from the judgment of the Circuit Court of Van Buren County.

3 APPLICATION OF DEFENDANT-APPELLANT FOR LEAVE TO APPEAL FROM THE JUDGMENT OF THE CIRCUIT COURT OF VAN BUREN COUNTY IN THE CASE OF THE PEOPLE OF THE STATE OF MICHIGAN vs. ELMER JOSEPH CRACHY.

Comes now the Defendant-Appellant, and respectfully shows to the court:

1. That he was convicted after a trial for the crime of Breaking and Entering on September 29, 1959; judgment on the verdict was pronounced by the court

on October 30, 1959, and a sentence of from 12 to 15 years in the penitentiary was imposed upon the defendant. The defendant filed his motion for a new trial which motion was denied by the court in an order filed with the Clerk of the court on December 9, 1959.

2. The reasons and grounds of the appeal in the said cause are as follows:

(a) The trial court overruled the defendant's motion to suppress the evidence. A serious question was raised under the holding of *People* v. *Gonzales*, 356 Mich. 274, as to whether or not the arrest of the defendant by police officers under the
4. circumstances of the case, and the subsequent search of the automobile thereupon, under the facts and circumstances surrounding the arrest, constituted probable cause to justify the arrest and search without a warrant. It is the contention of the defendant that the failure to suppress the evidence constituted a violation of the defendant's constitutional rights. In addition to the *Gonzales* case, the Supreme Court of the United States held an arrest and subsequent search of an automobile, under similar circumstances, invalid and in violation of the Fourth Amendment to the Constitution of the United States. This case, along with *Gonzales*, is controlling. *Henry* v. *United States*, No. 17—October Term, 1959, (decided November 23, 1959). 28 Law Week 4015.

3. That a statement of the proceedings and facts in said cause, so far as they are material, is hereto annexed.

4. That the applicant seeks leave to appeal by general appeal.

5-6 Request for continuance of bail.

7-10 Concise Statement of Proceedings and Facts.

7 CONCISE STATEMENT OF PROCEEDINGS AND FACTS.

The defendant was charged with Breaking and Entering a store building on May 19, 1959, known as the shopping center in the Village of Hartford, Michigan, with intent to commit the crime of larceny contrary to MSA 28.305. He filed his motion to suppress the evidence and a preliminary hearing was held before the Hon. Floyd Biske, Justice of the Peace for the Village of Hartford, Van Buren County, on May 28, 1959. All of the facts surrounding the arrest of the defendant and the search of his automobile were developed at that hearing. On the basis of the Transcript of Evidence filed with the Circuit Court for the County of Van Buren, the defendant filed his motion to suppress the evidence before the Hon. Carl D. Mosier, Circuit Judge. Briefs were filed and oral argument was heard by the court.

In a written memorandum the court denied the motion to suppress the evidence.

A trial by jury was had on September 28 and 29, 1959, during which the defendant objected to the introduction into evidence of certain exhibits found by
8 the police in the car of the defendant. The ground of the objection was the same as that advanced theretofore—that the evidence was illegally obtained by the police in violation of the defendant's constitutional rights. The court overruled the motion and allowed the exhibit into evidence.

The exhibits in question were identified by the owner of the store as having been taken from his store in the night time, the store having been broken into and burglarized by means of an entry from the roof top.

The jury found the defendant guilty. The court overruled defendant's motion for a new trial on October 30, 1959, and entered judgment upon the verdict and sentenced the defendant to 12 to 15 years in the penitentiary. One of the grounds advanced in the defendant's motion for a new trial is that the court erred in allowing the claimed illegally seized evidence into evidence over his objections.

THE FACTS SURROUNDING THE ARREST OF THE DEFENDANT AND THE SEIZURE OF THE PERSONAL PROPERTY FROM HIS CAR.

At about 2:30 in the early morning of May 19, 1959, two Michigan state police officers were patrolling on U.S. 12 in Chikaming Township, Berrien County. Officers Spletzer and Wellman observed the defendant's vehicle travelling at 60 miles per hour. Spletzer told the defendant that the officers stopped him for speeding because the posted speed limit was 50 miles an hour. The defendant got out of the car, produced his driver's license, issued from the State of Illinois. Officer Spletzer informed him that he was going to issue a summons for speeding, to which the defendant
9 replied that he thought he was going 55 miles but did not think he was going 60. The officer said that prior to this he had looked in the car (a panel-truck Chevrolet) and on the passenger's side he saw a box containing cartons of cigarettes. He also looked in the back of the panel-truck and observed more cardboard boxes covered with blankets. Inside these boxes were cartons of cigarettes.

The officer said that he held a conversation with the defendant and asked him where he got all the cigarettes and defendant said "Well, we bought them

in Benton Harbor from Flack's Supply Company, or something".

At one place in the testimony, after telling the defendant that he was going to give him a summons for speeding because he was exceeding the 50 mile limit, the officer stated: "Prior to this I had looked into the car and on the passenger's side was a box containing cartons of cigarettes, etc.", but later on the officer said that he looked into the car after he told him (Crachy) that he was arrested for speeding.

Fourteen cartons of cigarettes were offered into evidence, over the objections of the defendant on the ground that they were illegally seized in violation of the defendant's constitutional rights.

Although Officer Spletzer testified that he made out a traffic ticket charging the defendant with speeding, he did not give a copy of the summons or ticket to the defendant.

The defendant was taken to police headquarters where he was held through the night. Some eight
10 hours after his arrest, at about 10:30 in the morning, it was reported that a breaking and entering had occurred in a shopping center in the Village of Hartford, Van Buren County. The cartons of cigarettes were identified as being the object of the larceny from the store.

It is upon the above facts which the defendant claims that his constitutional rights were violated and upon which his appeal is predicated.

11 Order of trial court denying defendant's motion for a new trial or in the alternative a motion for acquittal notwithstanding the verdict of the jury.

12-18 Memorandum of the trial court in denying defendant's motion to suppress the evidence.

12 MEMORANDUM.

These defendants were charged with having, on the 19th of May, 1959, at the Village of Hartford, in the County of Van Buren, in the nite-time of said day, with force and arms (they did) feloniously break and enter the store building known and operated as the Shopping Center in the Village of Hartford, Michigan with intent to commit the crime of larceny.

A preliminary examination was held on May 28, 1959 in both cases, and based upon the testimony that was taken at the preliminary examinations the defendants have moved to suppress certain evidence taken at such examinations, being fourteen cartons of cigarettes, referred to as People's Exhibit No. 1.

The testimony given at the preliminary disclosed that Merritt D. Weeden was the operator of a super market known as a Shopping Center in the Village of Hartford. He had left the market on the evening of May 18th at 7:30 P.M. In accordance with his habit, Mr. Weeden came back to the market at about 1:15 A.M. on the morning of the 19th. He drove up in front of the store where he had opportunity to look into the store and look down the aisles. There were lights lighted inside the store. At that time he testified that he didn't see anything out of the way. The
13 cash register was in front of the cigarette rack, and as he looked into the window he saw the cash register, and behind it the cigarette rack. This procedure was a regular one with Mr. Weeden.

At 8:15 on the morning of the 19th of May Mr. Weeden found that the cash register had been taken out of the store and the cigarettes taken out of the rack. He also found that there had been taken an

electric fan, and the cash was missing from the cash register in the sum of $608.75. The cigarettes missing were of the value of approximately $1,200.00.

It was also shown by the testimony that entrance had been gained to the market through a hole in the roof which led to the women's rest room.

Sometime about 2:30 A.M. on May 19th two Michigan State Police Officers were patrolling on U. S. 12 in Chikaming Township, Berrien County, Michigan, and at that time they observed a Chevrolet panel truck on U. S. 12, and they clocked the speed of the truck at sixty miles per hour. The driver of the truck got out, produced the driver's license in the name of Elmer Crachy, a license issued from the State of Illinois. The officer told him that he had stopped him for speeding—that the posted speed limit was fifty miles per hour on the highway—and that he was going to issue him a summons for speeding, to which Crachy replied that he thought he was going 55, but did not think he was going 60. The officer said that prior to this he had looked in the truck, and on the passenger's side was a box containing cartons of cigarettes. Then in back of the panel truck it was covered with blankets, but he could look back there, and there were more boxes—cardboard boxes—and inside these boxes were cartons of cigarettes.

The officer said that he held a conversation with defendant Crachy and asked him where he got all the cigarettes, and he said "Well, we bought them in Benton Harbor from a Flack's Supply Company, or something." He asked defendant Allen where the cigarettes came from, and he said he bought them from Flack's Wholesale Company, and he gave 201 E. Lincolnway as the address.

At one place in the testimony the officer, after telling
14 Crachy that he was going to give him a summons for speeding because he was exceeding the 50 mile limit—the officer said "prior to this I had looked into the car and on the passenger's side was a box containing cartons of cigarettes, etc., but later on the officer said that he looked into the car after he told him (Crachy) that he was arrested for speeding.

There were fourteen cartons of cigarettes offered in evidence. The officer identified them because he had placed his initials, R. P. S., on the end of each carton.

Louise Weeden, the wife of the proprietor, testified that she worked in the Shopping Center, was there on the 18th of May, and on that day she stamped the selling price on the cigarettes in question. While she was stamping the price on the cigarettes she was advised by her husband that she had stamped them wrong. When asked how she had stamped them she said "I had put a 2 and a blank; then a thirty-three cent sign instead of a dollar sign in fromt of the 2. It should be the dollar sign and 2.33, which those are over there. Those are the ones which we had correct." She was referring to six of the fourteen boxes that had been offered in evidence as having been correctly marked. The other eight were improperly marked. The witness also identified stamps on the boxes of cigarettes as being like the ones from their store.

It is the claim of the defendants that the cigarettes were improperly received in evidence, and they have asked that the court suppress such evidence. It is claimed, on behalf of the defendants, that the cigarettes were seized as the result of an illegal search.

Considerable is said in the briefs as to whether the officer looked into the defendants car before or after

he advised the defendant Crachy he had been arrested for speeding.

A blue bag was observed in the truck behind the driver's seat, and it was produced at the preliminary examination, and when defendants counsel objected to its introduction the Prosecuting Attorney withdrew the exhibit and it was not re-offered.

In their briefs the defendants rely upon *People* v. *Gonzales*, 356 Mich., 247, and call attention to the language of the Supreme Court with reference to its discussion of search, using this language. "Thus the search of the place where a lawful arrest is made of one committing a crime has been held constitutionally reasonable when the search was designed to reach (1) the fruits of the crime; or (2) the means by which it was committed; or (3) instruments calculated to effect escape from custody. No such purposes appear to have been present in our instant case." To understand the discussion by our court in the *Gonzales* case it is necessary to know the facts which the court was considering.

In *People* v. *Gonzales* the defendant was a passenger in an automobile driven by one Leal. At 4:00 A.M. it was stopped by Michigan State Police for the fact that it had only one headlight burning. The trooper advised the driver of the defective light, and told him a summons would be issued for the violation.

> "The trooper then took Leal back to the State Police car and the summons was issued. Subsequently Trooper Samonek went back to the car and asked the two occupants (one of whom was defendant) to get out of the car so he 'could check it.' Under the circumstances outlined the police, of course, had no search warrant. Trooper Samonek then saw the butt of a pistol sticking out of the front seat and picked it up."
> *People* v. *Gonzales*, 356 Mich., 247.

In the case at bar we are not dealing with circumstances which required the officer to search the car. There was no occasion for him to check it. What he saw was visible when he came within a few feet of the defendants car. No search was necessary. The evidence was there to be seen. He would have seen no more had he had a search warrant.

"The officer did not need a search warrant to enter to put out a fire. With or without permission they were rightfully in the store, and being so there they made observations; they saw and took materials seemingly provided for a fire; all of which were properly received in evidence, having been had without violating the provision of the Constitution."

People v. *Chimovitz*, 237 Mich., 247.

"The officer was in a public place. From his place without the bar, where he had a right to be,
16 he saw the whiskey, the possession of which constituted a felony. He discovered the defendant committing a felony. No search was needed to establish that fact. The whiskey stood in plain view. It was the duty of the officer to take the defendant into custody and to seize the whiskey. He did both practically simultaneously. He violated no provision of the Constitution."

People v. *Chomis*, 223 Mich., 289.

People v. *Woodward*, 220 Mich., 511.

The above cases just referred to disclose situations where a search is unnecessary, but the authorities generally refer to the combined acts of search and seizure. The Constitutional provision which all of the cases relate to in no wise restricts peace officers if in the course of their duties they make reasonable searches and seizures. The constitutional inhibition refers only to unreasonable searches and seizures. To justify a search and seizure the officer must act on

some fact or circumstance or upon such information that would create in his mind a reasonable and honest belief that the law was being violated.

Section 28.874 M. S. A. reads as follows:

"Any peace officer may, without a warrant, arrest a person.

(C) When a felony in fact has been committed and he has reasonable cause to believe that such person has committed it."

"The rule is pretty well settled that if an officer believes and has good reason to believe that one has committed a felony or is committing a felony in his presence he has probable cause as the term is used, and may arrest without a warrant and search him before confining him in jail."

People v. *Licavoli*, 245 Mich., 202.

The rule regarding search and seizure is well stated in *People* v. *Miller*, 245 Mich., 115, where we said:

"Except where special restrictions are imposed by statute, the test of the legality of a search without a warrant, is whether it is reasonable. *People* v. *Case*, 220 Mich., 379 (27 A. L. R. 686). In applying the test to modern conditions, this court has held that an officer, charged with enforcement of the law, may search an automobile on the highway or in a public place when, from the exercise of his own senses or acting upon information received from sources apparently reliable, a prudent and careful person, having due regard for the rights of others, would be induced to the honest belief that a felony was being committed in such automobile."

17 In *People* v. *Goss*, 246 Mich., 524, we said:

"To justify a search and seizure, the officer must act on some fact or circumstance or upon such information that would create in his mind a reasonable and honest belief that the law was being violated."

People v. *Orlando*, 305 Mich., 686.

"Similarly, in *Carroll* v. *United States*, 267 U.S. 132 (45 S. Ct. 280, 69 L. ed. 543, 39 A.L.R. 790), the court held such search valid if made upon probable cause and that such probable cause exists only if fact and circumstances within the officer's knowledge and of which he has reasonable trustworthy information, are sufficient in themselves to warrant a man of prudence and caution in believing that an offense has been or is being committed."

People v. *Lansing Municipal Judge*, 327 Mich., 410-424.

The majority opinion in *People* v. *Gonzales* holds that the search and seizure was an unreasonable one, and attention is again called to the distinction in the facts with the *Gonzales* case and the case at bar.

We are not here dealing primarily with the guilt or innocence of the defendants, but we are considering a rule of evidence. The addition to our society of the use of the automobile has materially increased crime, and in many instances prevented its detection. If a police officer, in the exercise of his duty—stopping automobiles in the early morning hours which he discovers to be violating the traffic laws—also discovers facts which led him to believe that the operator of that car is engaged in some mission involving a felony, and there appears before him, as there did in this case, such quantities of cigarettes bearing retail stamps and price markings, and the operator of the car has no reasonable explanation for having them in his possession, and could not give a coherent answer as to the person from whom he obtained such cigarettes, it would seem that a reasonably prudent officer would be entirely justified in seizing such cigarettes, at least long enough to find out if the driver's possession was a bonafide and honest purchase.

"Especially, and with reference to the criminal law, we are sensitive to the constitutional rights

of alleged or convicted criminals. But equally sensitive are we to the demands of our people that they be as secure as may be from violence
18 and pillage. All too often, as we know judicially, the automobile is handmaiden to the assassin. Learned Hand put the problem we will someday reach in these words: 'The protection of the individual from oppression and abuse by the police and other enforcing officers is indeed a major interest in a free society, but so is the effective prosecution of crime, an interest which at times seems to be forgotten. Perfection is impossible; like other human institutions criminal proceedings must be a compromise.''
People v. *Gonzales*, 356 Mich., 247-264.

It is my opinion that the seizure of the evidence in question, under the circumstances shown, was reasonable, and defendant's motion to suppress is denied.

/S/ Carl D. Mosier
Circuit Judge

19 Order of trial court denying the defendant's motion to suppress the evidence.

20 Notice of Application for Leave to Appeal.

21 Order of the Supreme Court of Michigan dated June 8, 1960 denying defendant's Application for Leave to Appeal.

22-23 Defendant's Petition for Re-hearing on his Motion for Leave to Appeal.

24 Order of Supreme Court of Michigan dated January 10, 1961 denying the defendant's Petition for Re-hearing, and affirming the order entered on June 8, 1960 denying the Petition for Leave to Appeal.

25 Certification by the Clerk of the Supreme Court, dated March 24, 1961.

APPENDIX B

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

Section 1 of the Fourteenth Amendment to the United States Constitution provides in pertinent part:

> ". . . no State shall . . . deprive any person of life, liberty or property without due process of law; . . ."

The Fourth Amendment to the United States Constitution provides:

> "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."

Article 2, § 10, of the Michigan Constitution (1908), as last amended, reads as follows:

> "The person, houses, papers and possessions of every person shall be secure from unreasonable searches and seizures. No warrant to search any place or to seize any person or things shall issue without describing them, nor without probable cause, supported by oath or affirmation."

Section 28.874, Michigan Statutes Annotated, reads as follows:

> "Any peace officer may, without a warrant, arrest a person.
>
> (C) when a felony in fact has been committed and he has reasonable cause to believe that such person has committed it."